Rule 18, Ariz. R. Crim. P. – Jury trial

Response to Motion for Jury Trial for Misdemeanor Offense Classified as "Domestic Violence"

- **PLEASE NOTE: This response is designed to cover every issue we could think of on the subject. It is NOT designed to be filed in its entirety. Rule 35.1, Ariz. R. Crim. Proc., generally limits motions and responses to ten pages. Please select only the portions relevant to your fact situation to include in any response. Thank you.**

A defendant charged with a misdemeanor offense that otherwise is not eligible for a jury trial does not become entitled to a jury trial when that offense is classified as one of "domestic violence."

The State of Arizona asks this Court to deny the defendant's motion for jury trial. For the reasons set forth in the following Memorandum, the defendant is not entitled to a jury trial for the misdemeanor offense of [name of offense], whether or not it is classified as an act of "domestic violence." Therefore, this Court must deny the defendant's request.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Facts and Procedural Background

"The term 'domestic violence' is defined in A.R.S. § 13-3601(A) to include several crimes." *State ex rel. McDougall v. Strohson*, 190 Ariz. 120, 123, 945 P.2d 1251, 1254 (1997). [Insert a brief summary of the facts of the defendant's case, including the nature of the relationship between the defendant and the victim that brings the offense within one of the definitions of "domestic violence" in A.R.S. § 13-3601(A).]

The defendant is currently charged with [name of offense], a Class [insert number] misdemeanor offense, in violation of A.R.S. § [insert appropriate statute number]. The maximum term of incarceration imposable for this offense is [insert length of potential term]. Because of the relationship between the defendant and the victim, the

defendant's offense has been designated as an act of "domestic violence" under A.R.S. § 13-3601.[1]

The defendant has now demanded a jury trial, contending that a jury trial is required for his misdemeanor offense because it has been designated as a "domestic violence" case. However, for the reasons stated in this Response, he is not entitled to a jury trial.

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[1] Subsection A of that statute defines "Domestic violence" as follows:

> A. "Domestic violence" means any act which is a dangerous crime against children as defined in section 13-604.01 or an offense defined in section 13-1201 through 13-1204, 13-1302 through 13-1304, 13-1502 through 13-1504 or 13-1602, section 13-2810, section 13-2904, subsection A, paragraph 1, 2, 3 or 6, section 13-2916 or section 13-2921, 13-2921.01, 13-2923, 13-3019, 13-3601.02 or 13-3623, if any of the following applies:
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> > 1. The relationship between the victim and the defendant is one of marriage or former marriage or of persons residing or having resided in the same household.
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> > 2. The victim and the defendant have a child in common.
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> > 3. The victim or the defendant is pregnant by the other party.
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> > 4. The victim is related to the defendant or the defendant's spouse by blood or court order as a parent, grandparent, child, grandchild, brother or sister or by marriage as a parent-in-law, grandparent-in-law, stepparent, step-grandparent, stepchild, step-grandchild, brother-in-law or sister-in-law.
> >
> > 5. The victim is a child who resides or has resided in the same household as the defendant and is related by blood to a former spouse of the defendant or to a person who resides or who has resided in the same household as the defendant.

Thus, the factor that classifies an offense as an act of domestic violence is the relationship between the defendant and the victim, not the nature of the act itself.

II. Argument

The defendant is not entitled to a jury trial for [insert name of offense], the misdemeanor offense with which he is charged. The classification of the offense as one of domestic violence does not change the nature of the offense or the analysis of whether the offense requires a jury trial.

A. "Domestic violence" is not a substantive offense in Arizona, but is only a way of categorizing crimes. That categorization does not change the nature of the underlying offense.

The defendant is not entitled to a jury trial because the misdemeanor offense with which the defendant is charged, [name of offense], does not merit a jury trial. The classification of the offense as an act of domestic violence does not change the nature or the charged offense, nor does it affect the analysis to be followed in determining whether a jury trial is needed. Despite some imprecise language in the cases[2], there is no such substantive offense as "domestic violence" in Arizona. A.R.S. § 13-3601's "domestic violence" designation is only a way of categorizing certain crimes by reference to the relationship between the perpetrator and the victim. In other words, "A.R.S. § 13-3601 is a procedural statute; it does not create a separate offense of domestic violence." *State ex rel McDougall v. Strohson*, 190 Ariz. 120, 123, 945 P.2d 1251, 1255 (1997), *quoting State v. Schackart*, 153 Ariz. 422, 423, 737 P.2d 398, 399 (App. 1987). Therefore, whether a defendant is entitled to a jury trial cannot be determined merely by the designation of the offense as one of domestic violence.

Instead, the Arizona courts must determine whether an offense is jury-eligible based on the analysis set forth in *Derendal v. Griffith*, __ Ariz. __, 104 P.3d 147

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[2]For example, see *State v. Maturana*, 180 Ariz. 126, 128, n. 1, 882 P.2d 933, 935 (1994) [witness was "in custody on a domestic violence charge"]; *Matter of Soelter*, 175 Ariz. 139, 140, 854 P.2d 773, 774 (1993) [wife had filed "domestic violence charges" against husband].

(Arizona Supreme Court, Jan. 14, 2005), *overruling in part Rothweiler v. Superior Court*, 100 Ariz. 37, 410 P.2d 479 (1966) and *State ex rel. Dean v. Dolny*, 161 Ariz. 297, 300, 778 P.2d 1193, 1196 (1989).

B. Although the right to jury trial in Arizona is broader than the Federal right, Arizona does not require jury trials in all criminal cases. Only "serious" offenses require jury trials.

1. If an offense carried the right to jury trial at common law before statehood, a defendant is entitled to a jury trial. However, this defendant's offense, [name of offense], was not jury-eligible at common law, so he is not entitled to a jury trial under that prong of the *Derendal* test.

As the defendant states, the Arizona Constitution grants broader rights to jury trial than the United States Constitution does. Nevertheless, Arizona does not provide for jury trials in every criminal case. Jury trials are required only for "serious" offenses, not for "petty" offenses.[3]. *Derendal v. Griffith*, __ Ariz. __, __, ¶ 8, 104 P.3d 147, __ (Arizona Supreme Court, Jan. 14, 2005); *Benitez v. Dunevant,* 198 Ariz. 90, 93, ¶ 4, 7 P.3d 99, 102 (2000); *Raye v. Jones*, 206 Ariz. 189, 190, ¶ 5, 76 P.3d 863, 864 (App. 2003). The right to jury trial is determined by reference to the elements of the charged offense, not to the facts of the individual case. *Urs v. Maricopa County Attorney's Office*, 201 Ariz. 71, 73, ¶ 4, 31 P.3d 845, 847 (App. 2001).

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[3]Note that in this context, the term "petty offense" is *not* synonymous or coextensive with "petty offense" as defined in A.R.S. § 13-105 (27) ["an offense for which a sentence of a fine only is authorized by law."] Nor does the term "petty offense" mean that the offense is "trivial" or "unimportant." Rather, in this context, "petty offense" is a term of art, meaning only "an offense for which no jury trial is required." As the Court of Appeals has explained, a "petty" offense in this context is synonymous with a "minor" offense, and is not dependent on the legislature's classification of a crime as a misdemeanor or felony. *Urs v. Maricopa County Attorney's Office*, 201 Ariz. 71, 72, ¶ 3 n. 2, 31 P.3d 845, 846 (App. 2001).

In *Derendal*, the Court explained that Article 2, § 23 of the Arizona Constitution states, "[T]he right of trial by jury shall remain inviolate." This provision is not a grant of the right to a jury trial – rather, it preserves the right to jury trial for any offense that was jury-eligible at common law. The *Derendal* Court held that, in determining whether a defendant is entitled to a jury trial for a particular offense, Article 2, § 23 requires the Court to determine if the offense carried the right to a jury trial under common law. If so, a defendant charged with that offense is entitled to a jury trial. *Derendal v. Griffith*, __ Ariz. __, __, ¶ 9, 104 P.3d 147, __.

The *Derendal* Court recognized that Arizona abolished all common law crimes in 1978, and that, therefore, many statutory offenses now have "no precise analog in the common law." The Court explained, "We regard a jury-eligible, common law offense as an antecedent of a modern statutory offense when the modern offense contains elements comparable to those found in the common law offense." *Id*. at ¶ 10. When an offense was jury-eligible before statehood, that right carries over to modern statutory offenses of the same "character or grade." *Derendal*, ¶¶ 9-10.

In short: The defendant here is charged only with [name of offense], a Class [number] misdemeanor that was not jury-eligible at common law. He is therefore not entitled to a jury trial under Article 2, § 23 of the Arizona Constitution. Because the defendant's offense was not jury-eligible at common law, he is only entitled to a jury trial if the offense satisfies the second stage of the *Derendal* analysis. As will be discussed below, the defendant's offense is punishable by six months or less of incarceration, so the courts will presume that no jury trial is required.

2. Under *Derendal*, because the defendant's misdemeanor offense, [name of offense], is punishable by no more than six months of incarceration, it is presumed that no jury trial is required.

Arizona has long recognized that most defendants charged with misdemeanor offenses in Arizona are not entitled to jury trials.[4] "As a general rule, the penalties attendant to misdemeanor offenses in this state are, of themselves, not enough to secure a jury trial." *Benitez v. Dunevant*, 198 Ariz. 90, 94, ¶ 13, 7 P.3d 99, 103 (2000); *see also Spronken v. City Court*, 130 Ariz. 62, 64, 633 P.2d 1055, 1057 (App. 1981).

Before Derendal, Arizona courts analyzed whether a case was jury-eligible based on a test established by *Rothweiler v. Superior Court*, 100 Ariz. 37, 42, 410 P.2d 479, 483 (1966), *overruled in part by Derendal v. Griffith*, __ Ariz. __, 104 P.3d 147 (Arizona Supreme Court, Jan. 14, 2005). Under *Rothweiler*, the courts had to consider three factors, any one of which would independently require a jury trial:

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[4] By contrast, defendants charged with *felony* offenses in Arizona are ordinarily entitled to jury trials. Every felony in Arizona ordinarily carries a possible sentence of at least one year of prison. *See* A.R.S. § 13-701(C); *but see* A.R.S. § 13-901.01 [stating that defendants convicted of certain drug and paraphernalia offenses must receive probation]; *State ex rel. Romley v. Martin*, 205 Ariz. 279, 281, ¶ 7, 69 P.3d 1000, 1002 (2003) [defendants convicted of crimes carrying mandatory probation under A.R.S. § 13-901.01 could not be impeached with those convictions under Rule 609(a)(1), Ariz. R. Evid., because those crimes were not "punishable by death or imprisonment in excess of one year"]. *Also see Benitez v. Dunevant*, 198 Ariz. 90, 93, ¶ 6, 7 P.3d 99, 102 (2000) [Jury right does not attach to a felony "merely because the legislature has classified it as such, but rather, because, applying our own test, the right attaches to an offense that is sufficiently serious or would have been protected at common law. … Rather, we look to the consequences of a conviction including the penalties and their impact, as well as the public condemnation of the act, to determine whether any given offense warrants a constitutionally protected jury right"].

1. The severity of the penalty that could be inflicted for the offense;
2. The moral quality of the act; and
3. The relationship of the act to common-law crimes.

The *Rothweiler* test proved to be cumbersome and difficult to apply. In *Derendal*, recognizing the inconsistent results produced by the *Rothweiler* test, the Arizona Supreme Court abolished the "moral quality" prong of the *Rothweiler* test. *Derendal*, __ Ariz. __, __, ¶ 32, 104 P.3d 147, ___. ¶

Federal law provides a presumption, established in *Blanton v. City of North Las Vegas*, 489 U.S. 538, 543 (1981), that offenses punishable by six months of incarceration or less are not jury-eligible. In *Derendal*, *id*. at ¶ 8, the Arizona Supreme Court expressly adopted the *Blanton* presumption for offenses that were not jury-eligible at common law. The *Derendal* Court held that when the legislature classifies an offense as a misdemeanor carrying no more than six months of incarceration, the courts will "presume that offense to be a petty offense that falls outside the jury requirement of Article 2, Section 24 of the Arizona Constitution." This approach leaves the legislature with the primary responsibility for determining whether an offense is "serious." *Id*. at ¶ 21.

Because this defendant's offense, [name of offense], is punishable by six months or less of incarceration, under *Derendal*, this Court must presume that the defendant is not entitled to a jury trial. To overcome that presumption, the defendant would have to make three showings under *Derendal*. However, he cannot make any of those three showings, as the following analysis will explain.

3. The defendant cannot make any of the three showings necessary to overcome the *Derendal* presumption that his misdemeanor offense is not jury-eligible.

In *Derendal*, the Court stated the presumption that any offense punishable by six months or less of incarceration is not jury-eligible. *Derendal* at ¶ 21. However, the *Derendal* Court stated, a defendant can overcome that presumption if he shows that the offense is "serious" by establishing three factors: (1) the offense carries some additional serious consequence imposed directly by an Arizona statute; (2) the additional consequence is severe enough to approximate imprisonment; and (3) the additional consequence falls uniformly on all defendants convicted of the offense. *Id*. at ¶¶ 23-25. The defendant here cannot make any of those three showings.

First, as to [name of offense], the offense with which the defendant is charged, no Arizona statute imposes any "additional serious consequence" for a conviction beyond the consequences of any misdemeanor conviction. *Derendal* and *State ex rel. McDougall v. Strohson*, 190 Ariz. 120, 123, 945 P.2d 1251, 1254 (1997), are controlling. In *Strohson*, the defendant was charged with misdemeanor simple assault. He argued that the classification of the offense as one of "domestic violence" entitled him to a jury trial. The defendant recognized that the Arizona Supreme Court had repeatedly held that misdemeanor assault was not a jury-eligible offense. *See Bruce v. State*, 126 Ariz. 271, 614 P.2d 813 (1980) and *Goldman v. Kautz*, 111 Ariz. 431, 531 P.2d 1138 (1975). However, he claimed that because a new federal law prohibited persons convicted of "a misdemeanor crime of domestic violence" from possessing firearms, the "domestic violence" designation of his misdemeanor assault now subjected him to such serious consequences that a jury trial was required.

The *Strohson* Court disagreed, reasoning that in determining whether an Arizona offense required a jury trial, the Arizona courts would not look to the possible collateral consequences that "do not flow from the law of the state." *Strohson*, 190 Ariz. at 125, 945 P.2d at 1256. The Court reasoned that for practical and pragmatic reasons, Arizona courts should not have to determine jury eligibility "based upon an analysis of the individual defendant before the court. If we were to do so now, we would have the anomalous situation where some persons would be entitled to a jury trial and others would not, although charged with exactly the same substantive Arizona crime." *Id*.

Derendal clarified this rule by stating that, when considering the "seriousness of the penalty" issue, the penalty in question "must arise directly from statutory Arizona law." That is, the court need not consider consequences that flow from federal law, non-statutory sources, or "societal repercussion[s]." *Id*. at ¶ 23.

Strohson necessarily determined that the other penalties inherent in a misdemeanor domestic violence case did not mandate a jury trial. This is evident because the city court in *Strohson* granted the defendant's request for a jury trial, but the Supreme Court set aside the city court's order, holding that the defendant was "not entitled to a jury trial as of right under Arizona law." *Strohson*, *supra* at 127, 945 P.2d at 1258. But the appellate court is obliged to affirm the trial court's ruling if the result was legally correct for any reason. *State v. Dawson*, 164 Ariz. 278, 792 P.2d 741 (1990); *State v. LaGrand,* 153 Ariz. 21, 29, 734 P.2d 563, 571 (1987); *State v. Thompson,* 166 Ariz. 526, 527, 803 P.2d 937, 938 (App. 1990). Thus, if the defendant in *Strohson* had been entitled to a jury trial on any theory, the Supreme Court would have affirmed the city court's order even though the city court might have based its conclusion on an

incorrect theory. So *Strohson* established that the characterization of an offense as one of domestic violence did *not* in itself require a jury trial for that offense.

Despite *Strohson*, *supra*, the defendant argues here that Arizona law has changed since 1997, when *Strohson* was decided, so that the Arizona statutes now reflect the Legislature's deep concern for domestic violence cases. He contends that Arizona law now imposes such serious consequences for any domestic violence-related conviction that a jury trial is required. As the following analysis will show, the defendant is not entitled to a jury trial under the "severity of the penalty" prong of the *Derendal* analysis because of any changes in Arizona law since *Strohson.* The State will address each of the defendant's arguments in turn.

a. "Severity of the penalty" – Fingerprint clearance card restrictions

First, the defendant asserts that under Arizona laws that became effective April 1, 2002, if he is convicted of any offense involving domestic violence, he will be prohibited from obtaining a "fingerprint clearance card." A.R.S. §§ 41-1758.03 and 41-1758.04. He concludes that this is a serious consequence affecting his employability imposed by Arizona law for a conviction for a domestic violence offense, and that therefore he is entitled to a jury trial for his offense.

First, the *Derendal* Court stated that for a consequence to be "severe," it must "approximate in severity the loss of liberty that a prison term entails." *Derendal*, *id*. at ¶ 24, *quoting Blanton*, *supra*. It is obvious that inability to obtain a fingerprint card is not substantially equivalent to imprisonment.

In addition, the fingerprinting statutes do not single out offenses classified as involving domestic violence for any special treatment. The statutes in question apply

only to persons who are required by certain statutes to be fingerprinted, namely, persons who work directly with children or the disabled – for example, A.R.S. § 8-322, juvenile service providers; § 15-512, school personnel; § 15-534, personnel at the state school for the deaf and blind, § 15-1330; teachers; and § 36-882, day care center workers. A.R.S. § 41-1758(5). Compare *Benitez v. Dunevant*, 198 Ariz. 90, 7 P.3d 99 (2000) [abridgement of driving privilege for driving on a DUI-suspended driver's license was not a sufficiently severe consequence to mandate a jury trial]. In addition, the fact that a conviction may make a defendant less employable "does not automatically warrant a jury trial." *State ex rel. McDougall v. Strohson*, 190 Ariz. 120, 122, 945 P.2d 1251, 1253 (1997), *citing Spitz v. Municipal Court*, 127 Ariz. 405, 408, 621 P.2d 911, 914 (1980). In *Spitz*, the Court held that suspending Spitz's liquor license, which prevented him from working in liquor sales, was not a sufficiently grave consequence to warrant a jury trial.

Further, A.R.S. § 41-1758.03(C) lists *sixty* categories of offenses, of which "Offenses involving domestic violence" is only one, A.R.S. § 41-1758.03(C)(59). The categories of offenses include shoplifting, § 41-1758.03(15); possession of an "incomplete credit card," (C)(24); "misconduct involving simulated explosive devices," (C)(31); and "concealed weapon violation," (C)(32). This hardly indicates that the Arizona Legislature was singling out domestic violence crimes for special treatment.

In addition, the Arizona fingerprinting statutes do not require a person to be *convicted* of a listed offense to prohibit that person from being eligible for a fingerprint card. Instead, they bar even a person "who is awaiting trial on" any of the listed offenses, or an attempt to commit any of the listed offenses, from receiving such a card. Since the "severity of the penalty" prong of the *Derendal* test focuses only on the direct

statutory consequences of a *conviction*, consequences of a *charge* of the offense are irrelevant to the *Derendal analysis*.

Next, while an unresolved charge or conviction of a misdemeanor offense classified as a domestic violence offense, such as [name of offense], the offense with which the defendant is charged here, ordinarily precludes a person from receiving a class one fingerprint clearance card, that person may still obtain a card under an exception. Under A.R.S. § 41-1758.03(C), such persons "may petition the board of fingerprinting for a good cause exception pursuant to § 41-619.55." Under A.R.S. § 41-619.55(D), a person seeking a "good cause exception" can explain to the fingerprinting board the nature of the offense and any applicable mitigating circumstances. The person can also establish the fact that the person has been rehabilitated by showing such facts as completion of probation and counseling, and may also submit "[p]ersonal references attesting to the person's rehabilitation." Thus, the possible effects on the defendant's employability do not rise to the level of requiring a jury trial.

More fundamentally, nothing suggests that, in enacting the fingerprinting statutes, the Arizona legislature thereby also intended to extend the right to a jury trial to all persons accused of any misdemeanor offense falling within any of the sixty classes of offenses listed in that statute. Courts should avoid giving a statute an interpretation requiring something outside the plain intent of the legislature as expressed by the language of the statute. *State v. Evenson*, 201 Ariz. 209, 219, ¶ 40, 33 P.3d 780, 790 (App. 2001); *State v. Affordable Bail Bonds*, 198 Ariz. 34, 37, ¶ 13, 6 P.3d 339, 342 (App. 2000). In particular, A.R.S. § 41-1758.03(C)(4) bars persons convicted of simple assault, or even attempted simple assault, from receiving a fingerprint card. And the Arizona courts have repeatedly held that a person charged with misdemeanor assault is

not entitled to a jury trial. *Strohson*, *supra.* The defense's position here would not only grant *this* defendant a jury trial. Rather, the defendant's position, logically extended to cover *all* of the misdemeanor crimes included in the fingerprinting statute, would result in an explosive and unwarranted expansion of the right to jury trials in Arizona. Therefore, the fact that a person convicted of a misdemeanor domestic violence offense cannot receive a fingerprint card without first applying for an exception cannot be dispositive of the right to a jury trial.

b. "Severity of the penalty" – Mandatory counseling

The defendant next points out that under A.R.S. § 13-3601.01, the sentencing court must order every person convicted of a domestic violence offense "to complete a domestic violence offender treatment program" at the convicted person's expense. He asserts that this mandatory counseling requirement is a "serious consequence" of a domestic violence offense that entitles him to a jury trial.

This argument fails for several reasons. First, *Derendal* established that for a penalty to be "severe," it must be so onerous as to approach the loss of liberty caused by incarceration. *Derendal* at ¶ 24. Requiring a defendant to attend counseling does not approach the loss of liberty inherent in incarceration.

Second, requiring a defendant to attend mandatory counseling is intrinsically different from incarceration or a fine. Counseling is not "punishment" – its ends are rehabilitative rather than punitive. Requiring counseling for an offense suggests, not that society considers such offenders as especially dangerous, but rather that society views such offenders as misguided and readily capable of rehabilitation. A counseling program is intended to change a defendant's future behavior by teaching him new skills, not to punish him for past behavior. Compare A.R.S. § 13-901.01(D), requiring a drug

offender to participate "in an appropriate drug treatment or education program administered by a qualified agency or organization that provides such programs to persons who abuse controlled substances" at the offender's expense.

The diversion provisions of A.R.S. § 13-3601(M) also show that the legislature treats domestic violence offenses as *less* serious than the same offenses that are not so classified. When a defendant is found guilty of a domestic violence offense, § 13-3601(M) allows the judge to *defer entering a judgment of guilt* and place the defendant on probation. If a defendant successfully completes the terms and conditions of probation imposed for his first domestic violence offense, "the court *shall* discharge the defendant and dismiss the proceedings against the defendant." [Emphasis added.] This provision gives the domestic violence defendant who complies with the terms of his probation an opportunity to avoid a conviction altogether. This statute is more lenient than the general "set aside" statute, A.R.S. § 13-907, because § 13-3601(M) *requires* the judge to dismiss the charge against a defendant who successfully completes probation. By contrast, under the general statute, a defendant who is convicted of an offense and successfully completes probation or sentence must "apply to" the judicial officer who imposed sentence "to have the judgment of guilt set aside." The judicial officer then has discretion whether or not to grant the application. The mandatory set-aside provision, § 13-3601(M), shows that the legislature treats domestic violence offenses as *less* serious than non-domestic violence offenses.

Finally, *any* conviction for *any* offense has consequences, but that does not mean that every defendant is entitled to a jury trial for every offense. See *Benitez v. Dunevant*, 198 Ariz. 90, 92, ¶ 3, 7 P.3d 99, 100 (2000) [holding the offense of driving on a DUI-suspended license was not jury-eligible]. Therefore, the mandatory counseling

provisions do not constitute a "serious consequence" requiring a jury trial under the *Derendal* analysis.

c. "Severity of the penalty" – "Mandatory booking"

The defendant next contends that only domestic violence offenses require a police officer to take a misdemeanor defendant into custody rather than cite and release that defendant. He notes that A.R.S. § 13-3903 allows an officer to cite and release any person "arrested for an offense that is a misdemeanor or a petty offense," and § 13-3883(A)(4) allows an officer to arrest a person for a misdemeanor on probable cause and cite and release that person under § 13-3903. However, he asserts that under § 13-3601(B), *all* domestic violence misdemeanor offenders must be booked into jail.

The defendant's assertion misstates the law. In fact, whether a domestic violence offender must be arrested under A.R.S. § 13-3601(B) depends on the facts of the individual case. The officer must make an arrest on probable cause only if the case involves the infliction of physical injury or the "discharge, use or threatening exhibition of a deadly weapon or dangerous instrument." Even in such a case, the officer need not make an arrest if the officer has "reasonable grounds to believe that the circumstances at the time are such that the victim will be protected from future injury." Many of the offenses classified as domestic violence under A.R.S. § 13-3601(A) rarely if ever involve any injury or weapon use, such as custodial interference, trespassing, criminal damage, interference with judicial proceedings by refusing to obey a court order, disorderly conduct by making unreasonable noise, and using a telephone to harass. Even in domestic violence offenses involving injury or weapons, the officer need not arrest the suspect unless the officer reasonably believes the victim is still in danger. Thus, the defendant's argument is based on a false premise and must fail.

Further, the "mandatory booking" statute depends on the facts of the individual case, but the right to jury trial depends, not on the facts of the individual case, but on the elements of the offense. *Urs v. Maricopa County Attorney's Office*, 201 Ariz. 71, 73, ¶ 4, 31 P.3d 845, 847 (App. 2001). In addition, the *Derendal* analysis focuses on the consequences of a **conviction**, not an arrest. Accordingly, the arrest provisions of the statutes are irrelevant to the "consequences" prong of the *Derendal* test. Thus, this claim must also fail.

d. "Severity of the penalty" – Firearms possession under Arizona law

The defendant's next claim is that since *Strohson* was decided, domestic violence offenses are the only misdemeanors that mandate that the defendant must become a prohibited possessor of firearms under A.R.S. §§ 13-3101 and 13-3102. He notes that A.R.S. § 13-3101(A)(6)(d) defines "Prohibited possessor" as including, among others, a person who "is at the time of possession serving a term of probation pursuant to a conviction for a domestic violence offense as defined in § 13-3601." He also points out that under A.R.S. § 13-3601(C), an officer "may temporarily seize" a firearm present at a domestic violence scene "if the officer reasonably believes that the firearm would expose the victim or another person in the household to a risk of serious bodily injury or death." He asserts that no other misdemeanors provide that weapons unrelated to the offense may be seized, and concludes that the consequences of a domestic violence misdemeanor conviction have increased so much since *Strohson* that a jury trial is now mandated.

This claim also fails. First, a misdemeanor domestic violence defendant does not become a prohibited possessor unless the sentencing court chooses to place the

defendant on probation for that offense, rather than sentencing him to a jail term. The domestic violence statutes do not mandate probation for a defendant found guilty of a domestic violence misdemeanor.

Second, under the Arizona statutes in effect in 1997, when *Strohson* was decided, *all* probationers were prohibited possessors.[5] The Arizona Legislature amended this statute in 2000 to *eliminate* a group of probationers from this category. The defendant's argument appears to be that because the legislature eliminated other certain probationers from the category of prohibited possessors, but left misdemeanor domestic violence probationers within the statute, the legislature made the defendant's offense more serious or significant. This argument makes no sense. The legislature does not make an offense *more* serious by reducing the possible consequences of *other* offenses. Misdemeanor domestic violence defendants like the defendant here are in exactly the same position they were in when *Strohson* was decided.

Third, the fact that an officer can seize weapons present when effecting a domestic violence arrest is not a consequence of a *conviction*. Therefore, that fact is irrelevant under the "serious consequence" prong of the *Derendal* test. Accordingly, these changes in Arizona law since *Strohson* do not entitle this defendant to a jury trial.

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[5]As amended in 1994, A.R.S. § 13-3101(6)(d) provided:

> 6. "Prohibited possessor" means any person:
>
> > (d) Who is at the time of possession serving a term of probation, parole, community supervision, work furlough, home arrest or release on any other basis or who is serving a term of probation or parole pursuant to the interstate compact under title 31, chapter 3, article 4.

That version of the statute was still in effect in 1997.

e. "Severity of the penalty" – Misdemeanor compromise

The defendant next notes that A.R.S. § 13-3981(B)[6], a defendant charged with a misdemeanor domestic violence offense cannot compromise the offense by satisfying the victim out of court "except on recommendation of the prosecuting attorney." He contends that this prohibition shows that the Legislature considers domestic violence offenses especially severe, citing *State v. Larson*, 159 Ariz. 14, 17, 764 P.2d 749, 752 (1988). The defendant concludes that he is therefore entitled to a jury trial on his domestic violence misdemeanor charge.

This argument fails for three reasons. First, A.R.S. § 13-3981(B) has not changed since *Strohson* was decided. Second, the statute does not single out misdemeanor domestic violence charges; dismissal of assault and threatening and intimidation charges also require the prosecutor's recommendation. And, as the Arizona Supreme Court has made clear, a defendant is not entitled to a jury trial for a simple assault. *Strohson*, *supra*. And third, the "severity of the penalty" prong of the *Derendal* test only applies to consequences of a *conviction*. A misdemeanor compromise is a pretrial provision that precludes any conviction. Thus, nothing in the misdemeanor compromise law entitles the defendant to a jury trial.

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[6] That subsection provides:

> B. If a defendant is accused of an act involving assault, threatening or intimidating or a misdemeanor offense of domestic violence as defined in § 13-3601, the offense shall not be compromised except on recommendation of the prosecuting attorney.

f. “Severity of the penalty” – Orders of protection

The defendant next argues that by enacting A.R.S. § 13-3602, the statute providing for orders of protection, the Arizona Legislature has decided that domestic violence allegations are so important that a person may be excluded from his own residence for five days without any notice or hearing based on mere allegations of domestic violence. Also, under A.R.S. § 13-3624, a court may issue emergency protective orders by telephone twenty-four hours a day. He concludes that since no other category of offense is treated the same way, he is entitled to a jury trial.

This argument is quickly refuted. First, orders of protection are not a consequence of a *conviction* for a domestic violence offense. Second, although A.R.S. § 13-3602 is included in Title 13 of the Arizona Revised Statutes, the Criminal Code, the statute allows a person to seek a protective order even though no criminal charges have been filed. In essence, the statute provides a civil remedy. Therefore, the protective order statutes are irrelevant to the *Derendal* analysis.

g. “Severity of the penalty” – Child custody

The defendant next claims that post-*Strohson* changes in the Arizona child custody statutes show that the Legislature now considers domestic violence charges more significant. He points to various subsections of A.R.S. § 25-403 that may affect a parent’s custody rights if the court finds “evidence of domestic violence,” and concludes that these changes mandate a jury trial.

The problem with this argument is that A.R.S. § 25-403 deals with the effects of domestic violence in the family law context, not in the context of criminal law. § 25-403(N) defines “domestic violence” for purposes of that subsection:

> For the purposes of this subsection, a person commits an act of domestic violence if that person does any of the following:
>
> 1. Intentionally, knowingly or recklessly causes or attempts to cause sexual assault or serious physical injury.
>
> 2. Places a person in reasonable apprehension of imminent serious physical injury to any person.
>
> 3. Engages in a pattern of behavior for which a court may issue an ex parte order to protect the other parent who is seeking child custody or to protect the child and the child's siblings.

This definition, of course, differs significantly from that found in A.R.S. 13-3601(A). Further, § 25-403 never mentions a criminal conviction for a domestic violence offense – that section uses the word "conviction" only in the context of drug offenses. The term "domestic violence" in § 25-403 is different from "domestic violence" under the criminal code. Thus, the use of the term "domestic violence" in Title 25 does not affect the jury trial eligibility for offenses of domestic violence under Title 13.

h. "Severity of the penalty" – personal identification data

The defendant next argues that he is entitled to a jury trial because under A.R.S. § 41-1750, defendants convicted of misdemeanor domestic violence offenses must have their fingerprints and other personal identification data included in the central state repository of criminal history information.

However, the identification data requirement is not limited to persons who have a *conviction* for a domestic violence offense. Rather, law enforcement authorities must provide such information for "all persons who have been charged with, arrested for, convicted of or summoned to court as criminal defendants for … offenses involving domestic violence as defined in § 13-3601." The requirement applies even to a person who was arrested for a domestic violence offense but never charged. Since the

"severity of the penalty" prong of the *Derendal* analysis applies only to consequences of *convictions*, this argument does not support the defendant's argument.

i. "Severity of the penalty" – Conclusion

The "severity of the penalty" prong of the *Derendal* test for jury trial eligibility pertains only to consequences of a *conviction* for a *criminal offense* that result from direct application of Arizona statutes. The defendant's arguments concerning consequences of arrests or charges and civil issues do not constitute consequences of a criminal conviction and, thus, are irrelevant to the first prong of the *Derendal* analysis. For all the reasons set forth above, the misdemeanor charge in this case does not meet the first prong of the *Derendal* analysis and does not require a jury trial for the defendant's misdemeanor domestic violence offense.

2. The *Derendal* Court abolished the "moral quality" prong of the *Rothweiler/Dolny* analysis. Therefore, arguments about the "moral quality of the offense" are now irrelevant.

Derendal abolished the "moral quality" prong of the *Rothweiler* analysis, noting that the test was difficult to apply and had led to inconsistent results. *Derendal* at ¶ 32. Therefore, arguments about the "moral quality of the offense" are now irrelevant. This Court is bound by *Derendal* and thus cannot consider the defendant's arguments concerning the "moral quality" of the charge of [name of offense].

The defendant then argues that the prosecution is treating victims of misdemeanor domestic violence unjustly because if those victims demanded a jury trial, they would be denied, based on the State's position that such offenses are "petty." He concludes that unless misdemeanor domestic violence defendants receive jury trials,

the State is implicitly and unjustly telling the victims of these crimes that their cases are unimportant, thereby undermining the mission and purpose of the Victims' Bill of Rights.

This argument is preposterous, for a number of reasons. First, to repeat a minor point, "petty offense" in this context does *not* mean "unimportant" or "trivial" – it is a term of art meaning only "an offense that does not require a jury trial." No one is saying that such "petty offenses" are "unimportant" or "not worth the prosecutor's time." This branch of the defense's argument is clearly meritless.

On a much more basic level, the defense's argument appears to be based on fundamental misunderstandings of how Arizona law is made, administered, and enforced. The defendant's argument ignores the fact that it is the *legislature* – not the prosecution – that decides what conduct constitutes a crime and determines the degree of an offense. *See State v. Prentiss*, 163 Ariz. 81, 85, 786 P.2d 932, 935 (1989). To put it another way, the legislature, not the prosecution, decided that the crimes the defendant committed were misdemeanor offenses. The prosecutor charges defendants with crimes based on whether the particular defendant's conduct fits a particular offense as defined by the Legislature. It is absurd to accuse the prosecutor of belittling victims by treating this sort of domestic violence crime as a misdemeanor, because it is the legislature, not the prosecution, that determined that these offenses are misdemeanors rather than felonies. Accordingly, the defendant should address these contentions to the Legislature, as the legislative branch of government – not to the prosecution (the executive branch) or to this Court (the judicial branch).

Further, while victims do have rights under Arizona law, see Rule 39, Ariz. R. Crim. P., and A.R.S. § 13-4401 *et seq*., those rights do *not* include any right to demand a jury trial in their cases. The right to a jury trial belongs to the defendant, not to the

victim. *See* Rule 18.1(b), Ariz. R. Crim. P. ["The defendant may waive his or her right to trial by jury with consent of the prosecution and the court."] The defendant's arguments are patently meritless and do not warrant any relief.

III. Conclusion

The defendant maintains that he is entitled to a jury trial for his misdemeanor offenses simply because they are categorized as domestic violence offenses. Indeed, he asserts that every defendant charged with any offense designated as a domestic violence offense under A.R.S. § 13-3601 *et seq*., must now receive a jury trial. The State responds that the defendant's argument would effect an explosive and unwarranted expansion of the right to jury trial in Arizona.

In the alternative, the defendant argues that his misdemeanor offense is subject to "special punishment." But, as set forth in detail in this Response, the defendant has not shown any grounds justifying a jury trial. Therefore, for all the reasons stated in this Response, this Court should deny the defendant's request for a jury trial.